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Supreme Court, U.S.
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No:_____

In The
Supreme Court of the United States

Gregory D. Ernest,
Petitioner

V

South Florida Baptist
Hospital
Respondent

On Petition for Writ Of Certiorari
To The Supreme Court of Florida

PETITION FOR WRIT OF CERTIORARI

Gregory D. Ernest,
Pro Se
5248 Nichols Dr. W
Lakeland, Fl. 33812(863) 648-1157

Questions Presented for Review

Rule14.1(a)

I. Does it prevent the illegally, terminated employee from obtaining his constitutional right to pursue legal recourse, if, after receiving a "right to sue" letter from the EEOC, his lawsuit is denied at summary judgment in a decision completely contrary to numerous precedent setting, published opinions of appeal's court and Supreme Court decisions? These opinions regard decisions not to be made by a judge but in fact, for a jury to decide: precedent setting decisions submitted by plaintiff with his "motion for summary judgment" and his INITIAL BRIEF at appeal. This decision in effect, creating a paper trial, with no ability for the plaintiff to submit sworn testimony by witnesses and no ability to prove the falseness or illegality of defendant's claims.

II. Does the current policy of routine affirmation of Circuit Court decisions "per curium" by the Appeals Court System effectively deny the aggrieved party from appealing his case to the State Supreme Court placing an unfair burden on the United States Supreme Court? This burden thereby preventing, again, the aggrieved party his

Constitutional, state statute mandated right to pursue legal recourse as the United States Supreme Court cannot hear all of the thousands of cases sent to them for appeal: cases that should have been decided by the lower Courts. Should the "per curium" system be disallowed unless the jurisdiction of the State Supreme Court be expanded to address this issue.

III. Does the inability of the illegally terminated employee to obtain or afford adequate counsel and the inability of that employee to maneuver pro se through an overworked, seemingly preferential Court system, create an environment whereby employees who have been the "working poor" and cannot afford the exorbitant fees of a private practice attorney inevitably fail in their attempt to regain their rights in the workplace? Those illegally discriminated against employees who have lost their constitutional rights; have created a huge population of under-employed, unemployable, handicapped persons who have been discarded by the "system". Created a situation where the employers have no fear or respect for the Court Systems, EEOC and other Agencies thereby instead of decreasing their

discriminatory practices, they continue instead, to run rampant over the most vulnerable segment of society with no concern for recourse.

IV. Is the "at will" doctrine an outmoded, inherently illegal doctrine which is used by employers and the Court System as an instrument to justify the unchecked, illegal, discrimination of the disabled American? Should this doctrine be given its place in history with all other discriminatory practices and should the "subordinates" of the work place be given the respect and constitutional rights given to them by our forefathers in the Constitution of the United States and the Bill of Rights. The doctrine that gives license to the "bullys" of the workplace to discard employees, not based on work performance, but instead discard them due to characteristics of handicap, both mental and physical or any other non performance based criteria that suits their fancy must be abolished.

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1 (b), the following identifies all of the parties appearing here and before the 2nd District Court of Appeals, and 13th Circuit Court, Florida.

The petitioner here is **Gregory D. Ernest, R.N. who has pursued this case pro se.**

Erin Jackson, Thompson, Sizemore and Gonzalez, 201 N. Franklin St., Suite 1600, PO Box 639, Tampa, Florida 33601 are attorneys of record for the appellee/defendant

The **Appellee and respondent here is South Florida Baptist Hospital, a florida Corporation** located in and doing business in Plant City, Florida, Hillsborough County.
florida Non Profit Corporation

principal Address 301 N. ALEXANDER ST
PLANT CITY FL 33563 Changed 05/02/2005
ATTN: W. G. ULBRICHT
301 N. ALEXANDER ST.
PLANT CITY FL 33563 US Changed

05/02/2005 Registered Agent Name & Address
ULBRICHT, WILLIAM G.
301 N. ALEXANDER ST, PLANT CITY FL

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 Petitioner states as follows. The parent Company of South Florida Baptist Hospital, Plant City is Baycare. Baycare is a parent company to numerous Hospitals and other medical related entities in Florida with their corporate offices in Hillsborough County.
Florida Profit Corporation BAYCARE HEALTH Principal Address 701 6TH STREET SOUTH
ST PETERSBURG FL 33701 12/11/2006
Mailing Address 701 6TH STREET SOUTH
ST PETERSBURG FL 33701 12/11/2006
Registered Agent Name & Address
THORNTON, ROBERT W
701 6TH STREET SOUTH
ST PETERSBURG FL 33701 12/11/2006
Address Changed: 12/11/2006
Officer/Director Detail Name & Address

Title D STEIN, NORMAN V
3100 E FLETCHER AVE, ADMIN DEPT
TAMPA FL 33613 US

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I. THIS CASE RAISES THE CRITICALLY IMPORTANT QUESTION OF WHETHER THE CREATION OF A HUGE UNDER-EMPLOYED AND UNEMPLOYABLE SEGMENT OF SOCIETY IS DUE TO THE OVERWORKED STATE COURT SYSTEM'S PREFERENCE FOR EMPLOYERS, TO THE "AT WILL" EMPLOYMENT DOCTRINE, THE INAPPROPRIATE USE OF SUMMARY JUDGMENT AT THE CIRCUIT LEVEL AND "PER CURIUM" OPINIONS DELIVERED BY THE APPEALS SYSTEM; ELIMINATING THE ABILITY TO APPEAL TO THE STATE SUPREME COURT. THIS ELIMINATES THE

PURSUIT OF JUSTICE FOR A HUGE DISCARDED SEGMENT OF SOCIETY. THESE ARE HAPLESS VICTIMS OF UNCHECKED DISCRIMINATION; THIS SEGMENT OF SOCIETY COULD BE A VIABLE, TAX PAYING ENTITY RATHER THAN A FINANCIAL DRAIN ON GOVERNMENT RESOURCES. MANY OF THESE DISCARDED EMPLOYEES FIND THEMSELVES ON THE STREETS, HOMELESS, CREATING A HUGE IMPACT ON SOCIETY.

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APPENDIX
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Supreme Court of Florida
Friday, August 10, 2007

CASE NO: SC07-1488
Lower Tribunal No(s).: 2D06-3139

GREGORY D. ERNEST	**vs**	**SOUTH FLORIDA BAPTIST HOSPITAL, ETC.**
Petitioner(s)		**Respondent(s)**

It appearing to the Court that it is without jurisdiction, the Petition for Review is hereby dismissed. See Jenkins v. State, 385 So. 2d 1356 (Fla. 1980).

No motion for rehearing will be entertained by the Court

A true Copy
Test:
Thomas D. Hall
Thomas D. Hall
Clerk, Supreme Court
/jj
Served:
GREGORY D. ERNEST
ERIN JACKSON
HON. PAT FRANK, CLERK
HON. WILLIAM P. LEVENS, JUDGE
HON. JAMES BIRKHOLD, CLERK

Seal
Supreme Court
Of the
State of Florida

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL OF FLORIDA SECOND DISTRICT

GREGORY D. ERNEST)
Appellant,)
V)
SOUTH FLORIDA)Case No2D06-
BAPTIST HOSPITAL,) 3139
A Florida corporation,)
Appellee,)
_____)

Opinion filed April 27, 2007.
Appeal from the Circuit Court for Hillsborough County; William P. Levens, Judge.

Gregory D. Ernest, pro se.

Thomas M. Gonzalez and Erin G. Jackson of Thompson, Sizemore & Gonzalez, Tampa, for Appellee.

PER CURIAM.
Affirmed.

ALTENBERND, WHATLEY, and DAVIS, JJ., Concur. Motion for rehearing denied

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT IN AND FOR HILLSBOROUGH COUNTY, STATE OF FLORIDA, CIVIL DIVISION

GREGORY D. ERNEST.
Plaintiff,

Case No: 03-CA-7039
v Division "R"

SOUTH FLORIDA BAPTIST, Inc,
A Florida Corporation,
Defendant,
_____/

FINAL JUDGMENT

THIS CAUSE came before the Court on Defendant's Amended Motion for Summary Judgment, filed April 14, 2006, and Plaintiff's Motion for Summary Judgment filed on November 17, 2005. Defendant's Memorandum of Law in Support of Defendant's Amended Motion for Summary Judgment was filed on April 14, 2006. Plaintiff's Dispute of Defendant's Memorandum of Law and Plaintiffs Motion for Sanctions, and Plaintiff's Answer to Defendant's Motion for Summary Judgment, Amended Motion for Summary Judgment Memorandum of Law in Support of

Summary judgment, were filed April 25, 2006. The Court having reviewed the motions, pleadings, memoranda, court file, having considered the evidence and argument presented to the Court at the hearing on May 8, 2006, and being otherwise fully informed in the premises, rendered its order on June 2, 2006. Accordingly, it is

ORDERED AND ADJUDGED that Plaintiff GREGORY D. ERNEST shall take nothing by this action, that judgment is hereby entered in favor of defendant SOUTH FLORIDA BAPTIST, INC. and against the Plaintiff and that Defendant shall go hence without day. The Court reserves jurisdiction to consider any motion for costs, to be filed by Defendant within thirty days after the filing of this judgment in accordance with Rule 1.525 of the Florida Rules of Civil Procedure.

14.1 (e) JURISDICTION

On August 10, 2007, The Florida State Supreme Court denied jurisdiction in my lawsuit Gregory D. Ernest v South Florida Baptist Hospital

Article three of the United States Constitution outlines the power of the Federal courts. Jurisdiction to consider appeals from state courts, rather than just federal courts, was created by the judiciary act of 1789 Supreme Court Rule 10: Considerations Governing Review on Certiorari, a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter.

In affirming the 13th Circuit's ruling in this lawsuit a conflict exists with several published decisions of other courts of appeal, ie. Lynn v. Deaconess Med. Ctr-West Campus, 160 F.3D 484, 486-488 (8th Cir 1998). Due to these conflicts, the United States Supreme Court has jurisdiction on Certiorari.

The "Rules of Civil Procedure" 2(A)(ii) state that the United States

Supreme Court has jurisdiction for discretionary review when a decision has a great effect on the proper administration of law.

14.1 (f) STATUTES

Title VII of the Civil Rights Act of 1964
The Americans with Disabilities Act of 1990 (ADA)

14.1 (g) STATEMENT OF THE CASE

This petition will show that although citations were provided stating precedence for jury trial, my suit was dismissed at summary judgment by the 13th Circuit Court, affirmed by the Florida Second District Court of Appeal per curium and denied jurisdiction by the Florida Supreme Court. This case illustrates the unbalanced scales of justice for the "little man". This unbalanced scale has had horrendous consequences for hundreds of thousands of displaced workers.

Those citizens, for no other reason than who they were, what their disability was, and their vulnerability, have been systematically terminated unlawfully, under the cloak of "at will" employment.

They have traditionally found no weight to their complaints and few incidences of justice. This unbalanced scale is a direct cause of the economic crisis in America with a huge homeless population; scores of workers who are unemployed, underemployed and unemployable; in some cases highly educated people.

14.1 (h) INTRODUCTION

My prosecution of this combination of lawsuits, Defamation of Character and Discrimination has been a difficult pursuit. I attempted numerous times to obtain counsel and the counsel I did obtain was at best incompetent and withdrew from this case. Although I expected no preferential treatment from the judicial system, I expected to be heard in a non-discriminatory manner with the opportunity to pursue this lawsuit to completion. I did not expect to be stymied at every turn by an attorney group who stonewalled discovery and changed witnesses' testimony in order to prejudice the Court. I did not expect a Court who would allow statements from defense counsel which should have merited sanctions. I expected my evidence to be at least given some credence as precedence dictated and

expected to be able to submit my evidence to a jury for their review as is my constitutional right.

This Petition represents my last hope at being able to obtain justice for myself and every other displaced employee who has received unfair, discriminatory treatment and was unable to pursue this very time consuming, expensive, difficult course of action. This is my last hope to send a message to employers, administrators, CEOs and Boards of Directors that discriminatory treatment is unacceptable, immoral, and unlawful and will not be tolerated. A message that, in this day and age, diversity is the norm and NO ONE will be treated in a disparate manner and ALL policies and procedures will be followed in the same fair manner to ALL employees no matter what the disability or gender. There are no more OPEN SEASONS.

All employees, no matter whether their disability is unsympathetic, should not be discriminated against. The "at will" doctrine where employees may be terminated "at will" is obsolete and unlawful discriminatory practices should not be allowed under this disguise. The time has come to hold legally and morally

accountable, employers who thumb their noses at statutes passed to end rampant discrimination under the protection of the "at will" doctrine. Employers who can generally afford the best counsel have been traditionally given the Court's support. It is time to hold accountable libelous statements made by employers about employees both by falsely negative disciplinary actions and falsely negative employee reviews. Qualified privilege should be a closely guarded privilege instead of an employer's prerogative to destroy an employee's career for malicious reasons. Unless these employers are forced to defend themselves to the Courts and to Juries, they have no reason to end these illegal acts.

PROCEDURAL HISTORY
PRECEEDINGS BELOW

This is a combined lawsuit, defamation of character, discrimination: I was terminated from the employ of the defendant in December of 2002. After learning that the defendant was defaming me to the State of Florida Unemployment office and to prospective employers, I filed a lawsuit for defamation of character. After the EEOC issued my "right to sue" letter, I filed, a

second lawsuit for discrimination. These lawsuits were subsequently combined. The final amended complaint was filed on May 24, 2005 in Hillsborough County, 13th Circuit Court. I unsuccessfully tried to obtain counsel and have pursued these lawsuits, pro se. I submitted to the 13th Circuit a Motion for Summary Judgment on November 27, 2005. This Motion contained 56 pieces of evidence and exhibits.

I filed two Motions for Sanctions which were denied and numerous other motions which were denied. The Defendant's filed their Motion for Summary Judgment in April 2006. Although I had submitted an extensive amount of evidence His Honor found in favor of the defendant's Motion for Summary Judgment in June 12, 2006. On July 6, 2006, I filed my appeal to the Second District Court of Appeal.

On April 27, 2007, the Second District Court of Appeals affirmed the decision of the 13th Circuit-Per Curium. I filed a Motion for Rehearing and request for a written Opinion May 10, 2007, which was denied on May 31, 2007. The Mandate was issued on June 20, 2007. A Motion to recall the Mandate and stay issuance

pending appeal to the Florida Supreme Court was denied July 17, 2007. I filed an appeal to the Florida Supreme Court who denied jurisdiction August 10, 2007. I am now pleading with the Honorable United States Supreme Court to review this case as my final attempt at justice for myself and all of the other wrongfully discriminated against employees who have been unable to obtain their lawful rights.

REASONS FOR GRANTING THE WRIT

GROUND/QUESTION I

A. DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH A DECISION OF ANOTHER DISTRICT COURT OF APPEAL OR OF THE SUPREME COURT ON THE SAME QUESTION OF LAW

(1)DISCRIMINATION-GENDER DISPARATE TREATMENT

The Appeals Court has rendered in published opinion, that as it is rare that two individuals are disciplined for the exact same offense, it is only necessary to

prove that the offenses are similar in nature to prove disparate treatment. It is also stated that employment lawsuits are lawsuits that are not appropriate to be resolved at summary judgment and should be allowed to go to the jury. In a case that is well known and frequently used as precedent, Lynn v. Deaconess Medical Center-West Campus, 160 F.3d 484 (8th Cir. 1998). Michael Lynn, a male nurse appealed entry of summary judgment in favor of Deaconess Medical Center. This case is nearly identical to mine. The Judges stated they reviewed the grant of summary judgment de novo, using the same standards as applied by the district court. See Hill v St. Louis Univ., 123 F. 3d 1114, 1118 (8th Cir. 1997). In discussion, they stated:

> "as proof of pretext, Lynn presented evidence that Deaconess disciplined female nurses in the Rehab Unit less severely than he was disciplined for conduct that was more egregious than his. Primarily, Lynn points to his supervisors' favorable treatment of another registered nurse in the Rehab Unit, Karen Mohr....The district court found that Lynn and Mohr were not similarly situated

for purposes of proving pretext because: (1) unlike Mohr, Lynn was not disciplined for the offense of sleeping; and (2) Lynn and Mohr had different disciplinary histories.

We think that the district court applied the "similarly situated" concept too narrowly when it stated that because Lynn had not engaged in the offense of sleeping, Deaconess's treatment of Mohr was not relevant to the issue of whether Lynn had been discriminated against. To show that employees are similarly situated, a plaintiff need only establish that he or she was treated differently than other employees whose violations were of 'comparable seriousness.' See Ricks v. Riverwood Int'l Corp., 38 F.3d 1016, 1019 (8th Cir. 1994).stating that in a disparate treatment case the fact that other employees did not commit the exact same offense as the plaintiff does not prohibit consideration of their testimony as long as their acts were of comparable seriousness. To require that employees always have to engage in the exact same offense as a prerequisite for finding them

similarly situated would result in a scenario where evidence of favorable treatment of an employee who has committed a different but more serious, perhaps even criminal offense, could never be relevant to prove discrimination.

The district court also incorrectly concluded that Mohr and Lynn were not similarly situated because Lynn had an extensive record of disciplinary problems and received three Letters while Mohr had had only one Letter issued to her. We think Lynn has produced sufficient evidence to at least create a factual dispute as to whether the differences in Mohr's disciplinary history and his were due to gender discrimination.....The record also shows...it took numerous reports and several months before Mohr was verbally counseled...It took more than eleven months of repeated reports...before Mohr was issued a single letter of understanding....Certainly Mohr's actions seem at the least to constitute the same kind of "serious lack of appropriate

> nursing judgment that resulted in Lynn's discharge. Thus, we find sufficient evidence to create a genuine fact issue as to whether the reason proffered by Deaconess was pretext.
>
> Thus, we conclude that Lynn presented evidence sufficient to create a reasonable inference that Deaconess's proffered reasons for discharging him were mere pretext for intentional discrimination. Under the McDonnell-Douglas framework, this is enough to survive a motion for summary judgment. Although Deaconess may ultimately be able to offer a plausible explanation for its treatment of Lynn and its other nurses, these are *matters to be decided at trial and not by summary judgment."*

My comparator, Karen Burns had a long history of clashes with co-workers and family members as evidenced by the information submitted from her personnel file in my Motion for Summary Judgment; appendix. She frequently had co-workers in tears and was described as

attempting to undermine her co-workers. (app_C___)

She attempted to dose an infant with too much Tylenol too soon and had the mother so upset the baby was admitted. (app__D_)

My comparator, Karen Burns who was described as "undermining" her co-workers was charge person on the night that I was "set up" by my manager, Natalie Rivera. Karen was not disciplined for any of her offenses until after my termination and was given the option of quitting in lieu of termination more than a year after I was terminated. She was not terminated by Natalie Rivera who was no longer employed by the facility but was disciplined and terminated by a replacement manager. (App A & B)

Since my termination, a female nurse overdosed a young mother with magnesium sulfate causing her death. (app_E__). Although this happened subsequent to my termination, the fact that this nurse, a female was not terminated shows a CONTINUING policy of disparate treatment.

I did no harm. Anything I did "wrong" was purely accidental (App F) or done with the best intentions. I tried to do my job. The "threatening" I was accused of was a blatant lie. I believe I could prove to a jury that my termination was a conspiracy between Natalie Rivera and Karen Burns. As Lynn v Deaconess, my "offenses" were not the "same" as Karen Burns, her "offenses" were deliberate acts and had the potential to cause far more harm yet I was terminated without benefit of the progressive disciplinary policy and she was not. Her offenses were far more egregious than mine and the fact that she was not disciplined until after I was terminated and at that, allowed to quit in lieu of termination, was gender disparate treatment outside the disciplinary policy of the hospital.

The only thing I "threatened" to do was start writing people up when they did things wrong. The only thing I have done since termination is to "write up" South Florida Baptist Hospital for the wrongs they have done me and the unfortunate patient they involved in this situation maliciously by releasing, illegally her personal medical records.

(2)DEFAMATION-PRIVILEGE

The decision has been rendered that qualified privilege is privilege that can be lost and whether privilege should be granted under qualified privilege is for the jury to decide.

Three notable cases, two by Appeals Courts and one by the Supreme Court of the State of Kansas agree that qualified privilege is a privilege that can be lost and should be for a jury to decide. In Smith, v S. Jim Farha K.S.A 80,418,

> **"A court should be cautious in granting a motion for summary judgment when resolution of the dispositive issue necessitates a determination of the state of mind of one or both of the parties. The existence of malice is ordinarily a *question of fact for the jury.*"**

In Murray v Holnam, Inc. and Thomas Thornton SCA 3283_, The Appeals Court concluded that

> **"Holman can be liable for Smoak's allegedly defamatory statement**

> even though Smoak did not have express authority to make the statement. We rule a principal may be held liable for defamatory statements made by an agent acting within the scope of his employment or *within the scope of this apparent authority.* Further, although the trial judge properly concluded Smoak was protected by a qualified privilege, genuine issues of material fact exist regarding whether Smoak exceeded the scope of his qualified privilege. Additionally, the issue of common law actual malice is a *question for the jury*".

In Affolter v Baugh Construction Oregon, Inc. OCA 9904-03897:A11087

> "To give rise to an issue of fact in a claim for defamation, the plaintiff must present evidence sufficient to establish that the defendant published to a third person a defamatory statement about the plaintiff...a defamatory statement is one that would subject another to 'hatred, contempt or ridicule. or tend to diminish the esteem, respect, goodwill or confidence in

which the other is held or to excite adverse, derogatory or unpleasant feelings or opinions against (the other).

Furthermore, we conclude that as a matter of law the statement was capable of a *per se* defamatory meaning. Statements that attach a person in the person's professional or employment capacity are defamatory *per se* ie., without allegation or proof of special damages, when the attack relates to specific characteristics that pertain to the plaintiff's field of ...

Viewing the record in the light most favorable to plaintiff, we conclude that the evidence is sufficient to give rise to a question of fact whether Forrester believed that his statement about plaintiff was true. There is evidence that Forrester had long expressed hostility to plaintiff and had a desire to have him removed from the job site. There is evidence that plaintiff was performing his job acceptably and was not intoxicated. Whether Forrester believed or reasonably believed the

> truth of his statement was a question of fact for the factfinder, as was the question of whether Forrester *abused a qualified privilege...*
>
> Because there are questions of fact as to whether Forrester believed the truth of his statement and because the statement, if made, would be defamatory *per se*, we conclude that the *trial court erred in granting defendant' motion for summary judgment...Reversed and remanded"*

Natalie Rivera, my department manager, showed obvious malice towards me from the beginning of my employment when she played a "practical joke" involving her also employed spouse and others on both the incoming and off going shifts when she accused me of theft of narcotics from the automated medication dispensary (pyxis). I was mortified. Defendants admit this "joke" but claim it was outside of Ms. Rivera's scope of employment. Ms. Rivera, was the one who determined my evaluation scores, disciplined, and ultimately initiated my termination,

She also deliberately and with malice wrote me up for "breech of patient confidentiality", exposing me to ridicule by those not in the "need to know". She subjected me to a "hidden" suspension. She knew this "write up" was fictitious because she personally spoke to the patient involved and attributed to this patient the statement that she was "humiliated". I have an affidavit (app__F__) in which the patient denies saying this and stated she told them "it was no big deal". Throughout my employment, Ms. Rivera rated me as acceptable in my job evaluations yet berated me with her subjective comments.

At the end of my employment Ms. Rivera had two plans to either force me to quit or do/say something to give her grounds to terminate my employ. She deliberately set me up on a night that my normal supervisor was not present and used her preferential female nurse, my comparator, Karen Burns as an instrument to give false statements in order to terminate me.

The hospital then issued this fabricated accusation to try to prevent my further employment in the area and

prevent my receipt of unemployment funds. Bartow Memorial Hospital has at this point refused to release the information and now states spoliation. I believe if this case could go to Court in front of a jury this facility and the persons with knowledge of the false accusations could be subpoenaed and forced to tell the truth. All I ask is that I have the opportunity to face my accusers in front of a jury of my peers as is my right in the Constitution.

Whether or not the lies told about me in the hopes of ruining my career are covered by qualified privilege are per opinions previously stated by multiple honorable Judges *for the jury to decide.*"

GROUND/QUESTION II

C. It has become common place for the Courts of Appeals to affirm the decision of the lower Courts "per curium". My appeal was affirmed without an opinion and the *Motion for Rehearing and request for written opinion was denied.* The Florida Supreme Court stated that they had no jurisdiction if a written opinion wasn't provided by the Court of

Appeals using Jenkins v State 385 Xo. 2d 1356 (Fla. 1980). In all reality D. when the Appeals Court affirms an opinion of the lower court it *is* issuing an opinion. The opinion they are issuing is that they agree with

the lower court's opinion and therefore the State Supreme Court should grant jurisdiction. When the Circuit Court, denies the right to a jury and ends a lawsuit at summary judgment it is denying the rights afforded by the constitution. When the Courts of Appeals and the Supreme Courts do not afford this denial the right to Appeal, this is again denying the aggrieved party their constitutional rights."

Traditionally, the Courts have ruled favorably for the employer in wrongful termination lawsuits due to the "at will" doctrine. Because the wrongfully terminated employee in all probability cannot afford a "top notch" attorney or an attorney of any sort, the fact that most employers have far greater resources and access to employment law specialists has created an unfair system for the employee. When this wrongfully terminated employee is "disabled" they are far less likely to be able to do any

more than file an EEOC complaint. They have no income, no job reference, and many have no job aspects.

GROUND /QUESTION III

E. DECISION HAS A GREAT EFFECT ON THE PROPER ADMINSTRATION OF JUSTICE

The EEOC cannot investigate or prosecute the tens of thousands of complaints per year for discrimination. The States cannot investigate or prosecute the majority of the cases under their jurisdiction. The unfortunate majority of discriminated individuals are issued a "Right to Sue" letter. This "Right to Sue" is only as strong as the Court system will allow it to be. If an individual has not the means to afford an attorney to pursue justice, his only options are to waive his rights or tackle the suit pro se. If this pro se is not given just notice and is discriminated against unfairly by the Court system it in effect prevents the *proper administration of Justice.* The decision to dismiss my lawsuit at summary judgment when reams of evidence should have been submitted to a jury prevented me from receiving *any* justice.

As shown in appendix G, the EEOC has published discrimination charges from 1997. In 1997 there were 80,680 charges filed. There were no less than 75.768 charges per year every year since. (app_G__)

Discrimination is not improving. Over a 10 year period if employers had any respect for the EEOC or any of the 50 State Departments concerned with discrimination or any respect for the Court systems, this number would be significantly lower or gone. The EEOC will only take a charge if they feel there is at least some substance to the charge.

Of these 75,000+ charges, the EEOC only files 300-400 lawsuits per year.(app_G&H__) This has left well over 75,000 individuals with a "right to sue letter" ten years =750,000+/-. Of these individuals, most of them as I was, are unable to find counsel to pursue their charges. Few of them ever make it to Jury trial because the weight of the Court system has been with the employer.

In-hospital deaths from medical errors are at 195,000 per year in the United States. 1.14 million patient-safety

incidents occurred among the 37 million hospitalizations in the medicare population between 2000-2002. The 16 patient-safety incidents accounted for 8.54 billion in excess in-patient costs to the medicare system over the three years studied. (app__I__)

In 2004 men accounted for only about 5.7% of Registered nurses in the United States...Discrimination and the fear of being stereotyped may help explain the lack of growth in the number of men in nursing says Bruce Wilson, PhD, RN associate professor at the University of Texas...Keeping men in the profession is also a challenge. While 80% of the Rns surveyed by Hodes indicated that they would become a nurse if given the choice again...found many dissatisfied male graduates. The percentage of men who left nursing ....more than tripled from 2% to 7.5%. (app _J__)

South Florida Baptist Hospital is more concerned with their female nurses who are "*team players*" than myself as a "male" nurse who they stated was *not an example of the customer service standards for South Florida Baptist Hospital.* Their priorities and others' skewed sense of priorities are a direct

contributing factor of thousands of medical error deaths per year.

The documented rampant male gender discriminatory treatment is a direct contributing factor in the nursing shortage that is threatening harm and death to thousands of dependant patients each year. The administration of South Florida Baptist hospital should be held accountable for allowing discriminatory treatment to continue unabated. The only way to do this is to reverse and remand this lawsuit to the Jury so they have to defend their deliberate, unlawful, discriminatory, and defamatory actions.

GROUND/QUESTION IV

D. DECISION IS OF GREAT PUBLIC IMPORTANCE

The "at will" doctrine of employment is archaic. The laws protecting employees in an "at will" environment are only as valid as the ability of the aggrieved party to pursue justice when illegal discriminatory practices continue unabated. Employers must be held accountable for the discriminatory actions against employees who cannot

afford reputable legal counsel. There are millions of workers in "at will" employment positions vulnerable to wrongful termination and countless workers unemployed and unemployable due to wrongful terminations. It has even been the opinion of some Justices that it should be abolished. (app__ K_)

In June 2007, there were 6.9 million unemployed people in the United States. Over the month, the unemployment rates for adult men were 4.1%, adult women 3.9%, whites 4.0%, blacks 8.5% Hispanics 5.7%. (app_L__) There were 77,927 persons who had given up on working.

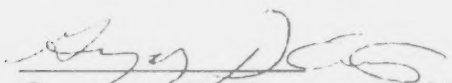
In Florida there were 1,767 initial unemployment claimants in June 2007. (app__K_) The number of unemployed workers who have run out of the additional weeks of unemployment benefits...has now passed the one million mark and continues to climb. According to MIT...the vast majority of those who lose their jobs have fewer than two months worth of savings, an amount that is insufficient to finance lengthy periods of unemployment. (app__L__)

South Florida Baptist hospital has had a history of frequent termination of

employees. Of the registered nurses terminated there was a disparate number of males terminated and a disparate number of male registered nurses are hired.

CONCLUSION

This petition for a writ of certiorari should be granted. I am appealing to a sense of honesty and decency that no one in this day and age should be discriminated against, fired just because of who they are, either for race, sex, religious affiliation, disability, etc. In the Court system the use of summary judgment and "per curium" opinions should be limited to where appropriate and not be used simply to alleviate the Court's docket. Only legal accountability will ever give teeth to the numerous laws and agencies that have been put in place to protect the American worker and until accountability is mandated, the poverty level comprised of the many people who could not fight for their rights will not diminish. Thank you.



Gregory D. Ernest, R. N., Pro Se
Date 11/27/07

14.1 (i) APPENDIX

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APPENDIX
CITATIONS

M. Lynn v. Deaconess Med. Ctr-West Campus, 160 F. 3D 484, 486-48 (8th Cir 1998) pages 1,7,8,9,10,12,13 16a-22a

N. Smith, v S. Jim Farha K.S.A 80,418 Page 14 23a-25a

O. Murray v Holnam, Inc. and Thomas ThorntonSCA3283 page 14,15 26a-30a

P. Affolter v Baugh Construction Oregon, Inc. OCA 9904-03897:A11087 Page 15,16,17 31a-33a

(A) Excerpted from Coaching/Counseling Record 01/24/2003 Karen Burns (app 61) Initial Brief of Appellant

Coaching/Counseling Record
Date: 01/24/2003
Team Member's name: Karen Burns
Position:: RNII
Dept/Unit: ER
TYPE OF ACTION: (Check One)
X Written Warning
Previous Counseling (level, reason, date): 07/04/02 Hired back to SFBH on with a contingency for a behavioral contract related to attitude and team morale.

01/06/03 Verbal warning issued to Karen regarding her reports from day and night staff that Karen's attitude and demeanor has very negative.

I. INCIDENT; Explain:...
Since meeting with Karen on 01/06/03, I have had 3 separate team members come to me in confidence that Karen continues to display a negative attitude and behave in a way destructive to team work and morale
Specific examples include:

(1) When in charge, assisting only with one RN's assignment and making comments out loud in the treatment area that the others

need to fend for themselves. The other nurses have been LPN's or less experienced RN's who need appropriate mentoring by the floating charge nurse. The role of the floating charge nurse is to float and assist all nurses and be the primary resource for the LPN(s) on duty.

(2) Making a mockery of the verbal coaching session with the manager on 01/06/03. Talking out on unit about personal conversation with manager about her depression (that she initiated). Telling the staff that the manager (Natalie) thinks she is crazy and asked her if she needed to be committed.

(Personal note this was within two months of my termination where she instigated the complaint about me)

(B)Excerpted from Employee disciplinary Notice (app 62) in Initial Brief of the Appellant

EMPLOYEE NAME: Karen Burns
DATE; 02-19-99
JOB TITLE: RN
DEPARTMENT: ER

TYPE OF NOTICE
X Verbal counseling

RN caring for difficult manipulative overdose in ER on 02-18-99. Pt non-compliant w/requests by RN. RN became frustrated and made inappropriate comment to pt. (Pt s/p OD)-RN told pt if she really wanted to kill herself, not to take pills, but to use a gun??-RN admits to saying this and admits to the inappropriateness of comment, stating she was very frustrated and lost her composure

Date 2/19/99 Natalie M. Rivera
Supervisor Signature

(C)Excerpted from exhibit found in appendix initial brief of appellant (app 67)

To whom it may concern,

I have worked with Karen Burns R. N. since May of 2002. Karen is a nurse with many years experience and a wealth of knowledge to share with others. My personal experience with Karen has never been a positive one. She has taken every opportunity to demoralize and discredit me as a staff member of the emergency room. I have seen her do the same with several other staff members.....In recent months Karen has intensified her attempts to discredit not only me, but other new staff members...While caring for this patient and her family, an order was generated for the patient in room eleven. I placed the order on top of the magazine that Karen was reading and asked her to medicate this patient. Karen went into the room to complete the order and I did not know until two hours later that Karen did not finish the order by hanging the required fluids. During the time that I

have known Karen, she has been negligent in her duties as a charge nurse on numerous occasions. She has instigated unkind discussions about other team members...Karen has used her position as charge nurse to demoralize and discredit staff members of her choice.

Sincerely,

Virginia Livermore R.N.

(D)Excerpted from Memo to Natalie Rivera exhibit (app 63) of Initial brief of appellant
From: Nurse Supervisor SFBH
Sent Monday July 14, 2003 3:50 am
To: Rivera, Natalie
Subject ER-Karen Burns, RN and Virginia Livermore, RN.

....**There was a mother of a pt....who came in to the ER @ about 1:30 PM. The mother is young.....I ended up writin a formal complaint and will refer to Judy, but this woman is so upset that she want Bill Ulbright involved....There was an incident with this particular child and Karen Burns and Virginia Livermore....(Karen) was going to give 110 mg instead of 80 mg. (Tylenol). The mother flipped out that we were going to overdose her child. My biggest concern is that Karen came to me upset because she is on her last warning for her attitude...I don't think we should hide our mistakes, but I don't think we need to always point them out either. I felt that to feed into this mothers' anguish kind of made us all look like idiots. I know your last day is coming soon....just thought you should know. I know this mom is going to pursue this she's on 2N now.**

Thanks, Laura Little, RN AOD

(E)Excerpted from the St. Petersburg Times/TampaBay Online

Hospital says error killed woman

An 18-year-old who had come to South Florida Baptist with labor pains received four times the ordered dosage of magnesium sulfate.

By LISA GREENE, Times Staff Writer
Published June 7, 2006

PLANT CITY- A pregnant woman died in South Florida Baptist Hospital two weeks ago because a nurse gave her an overdose of a common medicine, hospital officials said Wednesday.

Elisha Crews Bryant, 18, was seven months pregnant when she when she went to the hospital with early labor pains, family members said....The nurse who gave Bryant an IV bag of the drug mistakenly gave her too much, hospital officials said....
"I knew something wasn't right," said Bryant's husband, Preston Bryant, 21. "I tried to tell them, and they wouldn't listen."....

Hospital officials called a news conference to acknowledge the mistake after a spokesman for the family blanketed news media

Wednesday with e-mails blaming the hospital for Elisha Bryant's death and asking the public for money to help with medical and child care expenses....

Bill Ulbricht, the hospital's chief operating officer, made it clear that Bryant died because of a hospital nurse.....

The nurse is on administrative leave while the hospital continue to investigate. An OB-Gyn nurse for about 20 years, she has worked for the hospital for about seven years and has been an "outstanding team member." Ulbricht said.

He expects her to return to her job.....

(F)Exerpted from Affidavit from Traci Wimer "I told them it was no big deal" (App 5-8) Initial brief of Appellant

I, Traci Wimer am competent to testify to the information contained in this affidavit I am stating this information under oath and swear the information contained herein is the truth, the whole truth and nothing but the truth....

Question: Were you contacted by Natalie Rivera
Answer: Yes, I think I remember someone calling me.
Question: Did you state...that you didn't know why you were even involved in this that you told them (hospital) it was no big deal?
Answer: Yes

(G)Excerpted from Charge Statistics from the U.S. Equal Employment Opportunity Com...http://www.eeoc.gov/stats/charges.html

Charge Statistics

FY 1997 through FY 2006

1997	1998	1999	2000	2001
80,680	79,391	77,444	79,896	80,840

2002	2003	2004	2005	2006
84,442	81,293	79,432	75,428	75,768

(H) Litigation statistics

1997	1998	1999	2000	2001
332	414	465	329	428

2002	2003	2004	2005	2006
370	400	421	416	403

(I)Excerpted from Medica News Today
http://www.medicalnewstoday.com/medicalnews.phy?newsid-11856

In Hospital Deaths from Medical Errors at 195,000 per Year USA

Article Date 09 Aug 2004
An average of 195,000 people in the USA died due to potentially preventable, in-hospital medical errors in each of the years 2000, 2001 and 2002, according to a new study of 37 million patient records that was released today by HealthGrades, the healthcare quality company.....
Healthgrades examined 16 of the 20 patient-safety indicators defined by the Agency for Healthcare Research and Quality..."If we could focus our efforts on just four key areas-failure to rescue, bed sores, postoperative sepsis, and postoperative pulmonary embolism – and reduce these incidents by just 20 percent, we could save 39,000people from dying every year." Said Dr. Collier.

(J)Excerpted from AJN REPORTS: Men in Nursing: Still too Few: Discrimination and stereotypes still keep many from joining nursing ranks.

AJN, American Journal of Nursing
February 2006 Volume 106 Number 2
Pages 25-26

Nelson, Roxanne BSN, RN; Belcher, David associate Editor

Nursing remains a profession dominated by women in 2004 men accounted for only about 5.7% of RNs in the United States.....one major unresolved issue is discrimination, despite aggressive efforts by nursing schools and hospitals to recruit men..."I get e-mails all of the time from men, especially students, complaining about discrimination," says Jerry Lucas, RN, publisher of Male Nurse Magazine...

www.nursingcenter.com/library/journalarticleprint.asp?article_...

Keeping men in the profession is also a challenge...in the September-October 2002 issue of Health Affairs, found many dissatisfied male graduates...The percentage of new female RNs not working in nursing rose from 2.7% in 1002 to 4.1% in 2000, but the number of men who left nursing in that same time period more than tripled, from 2% to 7.5%

(K)Excerpted from History of At-Will Employment Law in the USA
By Ronald B. Standler

I have two purposes in posting this essay:
1. to inform citizens of the USA about the doctrine of at-will employment and urge that they contact their legislators and push for statutes that will end at-will employment, and
2. provide legal research that may assist attorneys for plaintiffs who need to argue against at-will employment....

A court in Missouri in 1985 reviewed wrongful discharge cases that were reported between 1977 and 1984 and concluded: As many of the decided cases illustrate, the burden of the at-will employment doctrine seems to be falling most heavily and harshly upon professional and upper and middle level employees. (footnote that cites 15 cases) They have the least protection. Most are at-will employees and few have job security through union or individually negotiated contracts. They have the most to lose.....Boyle v Vista Eyewear, Inc.,700 S.W.2d8559, 877-878 (Mo.App.

1985).....In my opinion, the doctrine of at-will employment was a major mistake, which continues to be propagated by judges with more respect for *stare decisis*, than either respect for fairness or desire to protect weaker parties from abuse...Clyde W. Summers, *Individual Protection Against Unjust Dismissal, 62 Virginia Law Review 481,521 (1976).* Concluded that protection of employees from wrongful discharge must come from the legislature...for the courts have thus far shown an unwillingness to break through their self-created crust of legal doctrine...A few bolder judges have pointed the way, but the great majority have lacked the courage or desire to follow.

(L)Excerpted from News Bureau of Labor Statisticshtt;//www.bls.gov/news.release/empsit.nr0.htm
United States Department of Labor, Washington, DC 20212

The number of unemployed persons (6.9 million) was essentially unchanged in June. The jobless rate has ranged from 4.4 to 4.6 percent since September 2006.

In June, 1.5 million persons...were marginally attached to the labor force compared with 1.6 million earlier. These individuals wanted and were available to work and had looked for a job sometime during the prior 12 months. They were not counted as unemployed because they had not searched for work in the 4 weeks preceding the survey. Among the marginally attached, there were 401,000 discouraged workers in June.....

EXCERPTED FROM full case can be found in the Appendix of the INITIAL BRIEF OF APPELLANT Appendix Tab 9

U.S. 8th Circuit Court of Appeals
MICHAEL LYNN V DEACONESS MEDICAL
United States Court of Appeals
For the eighth circuit

No.98-1110

Michel Lynn,
Appellant,
V
Deaconess Medical Center-West Campus, also know as Deaconess W. Hospital
Appellee

Appeal from the United States District Court for the Eastern District of Missouri

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Submitted: September 21, 1998
Filed: November 17, 1998

Before RICHARD S. ARNOLD, BEAM, AND MORRIS SHEPPARD ARNOLD, Circuit Judges,

BEAM, Circuit Judge,

Michael Lynn appeals from the district court's entry of summary judgment in favor of his former employer, Deaconess Medical Center-West Campus).

Lynn alleges that Deaconess terminated him on the basis of his gender in violation of title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. &&2000e to 2000e-17 and the Missouri Human Rights Act (MHRA), Mo. Ann. Stat. && 213l.010-213.137. For the reasons discussed below, we reverse and remand for further proceedings

.....II DISCUSSION

We review a grant of summary judgment de novo, using the same standards as applied by the district court. See Hill v St. Louis Univ., 123 F.3d 1114, 1118 (8th Cir. 1997). Summary judgment is proper if the evidence, viewed in the light most favorable to the nonmoving party, demonstrates that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. See id.: Fed. R. Civ.P.56©. The moving party bears the burden of showing the absence of a genuine issue of material fact. See Webb v. Lawrence

County,144 F.3d 1131,1134 (8th Cir. 1998). In reviewing employment discrimination claims, we keep in mind the caution that summary judgment should seldom be used in discrimination cases. See Crawford v. Runyon, 37 F.3d 1338, 1341 (8th Cir 1994). Because such cases often depend on inferences rather than on direct evidence, summary judgment should not be granted unless the evidence could not support any reasonable inference for the non movant. See id.

Title VII and the MHRA declare it unlawful for an employer to discharge "or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's ...sex" 42 U.S.C. &2000e-2(a)(1)); see also Mo. Ann. Stat. 213.055(1)(1)(a). Because Lynn has not put forth direct evidence of discrimination, his Title VII and MHRA claims are analyzed under the three stage burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and applied in countless other cases. .....Deaconess concedes that the first two stages of the McDonnell-Douglas framework have

been met., i.e., that Lynn has established a prima facie case of discrimination and that Deaconess has sufficiently articulated a nondiscriminatory reason for discharging him. It argues, however, that Lynn has not produced sufficient evidence to meet his burden of establishing pretext.

We disagree. As proof of pretext, Lynn presented evidence that Deaconess disciplined female nurses in the Rehab Unit less severely than he was disciplined for conduct that was more egregious than his. Primarily, Lynn points to his supervisors' favorable treatment of another registered nurse in the Rehab Unit, Karen Mohr....The district court found that Lynn and Mohr were not similarly situated for purposes of proving pretext because: (1) Unlike Mohr, Lynn was not disciplined for the offense of sleeping; and (2) Lynn and Mohr had different disciplinary histories.

We think that the district court applied the "similarly situated" concept too narrowly when it stated that because Lynn had not engaged in the offense of sleeping, Deaconess's treatment of Mohr was not relevant to the issue of whether

Lynn had been discriminated against. To show that employees are similarly situated, a plaintiff need only establish that he or she was treated differently than other employees whose violations were of "comparable seriousness. See Ricks v Riverwood Intl. Corp, 38 F.3d 1016, 1019 (8th Cir. 1994); see also McAlester v. United Airlines, Inc. 851 F.2d 1249, 1261 (10th Cir 1988) (stating that in a disparate treatment case the fact that other employees did not commit the exact same offense as the plaintiff does not prohibit consideration of their testimony as long as their acts were of comparable seriousness). To require that employees always have to engage in the exact same offense as a prerequisite for finding them similarly situated would result in a scenario where evidence of favorable treatment of an employee who has committed a different but more serious, perhaps even criminal offense, could never be relevant to prove discrimination.....

The district court also incorrectly concluded that Mohr and Lynn were not similarly situated because Lynn had an extensive record of disciplinary problems and received three Letters while Mohr had had only one letter

issued to her. We think Lynn has produced sufficient evidence to at least create a factual dispute as to whether the differences in Mohr's disciplinary history and his were due to gender discrimination.....

...it took numerous reports and several months before Mohr was verbally counseled about her sleeping problem. It took more than eleven months of repeated reports of sleeping on the job before Mohr was issued a single letter of Understanding. Sleeping on the job appears to us to be particularly egregious misconduct for a nurse on duty. The gravity of Mohr's infraction is further exacerbated by the fact that sometimes Mohr would be the only nurse present.....

Certainly Mohr's actions seem at the least to constitute the same kind of "serious lack of appropriate nursing judgment" that resulted in Lynn's discharge. Thus we find sufficient evidence to create a genuine fact issue as to whether the reason proffered by Deaconess was pretext.....Thus, we conclude that Lynn presented evidence sufficient to create a reasonable inference that Deaconess's proffered

reasons for discharging him were mere pretext for intentional discrimination. Under the McDonnell-Douglas framework, this is enough to survive a motion for summary judgment. Although Deaconess may ultimately be able to offer a plausible explanation for its treatment of Lynn and its other nurses, these are matters to be decided at trial and not by summary judgment.

III CONCLUSION

The judgment is reversed, and the case is remanded to the district court for further proceedings consistent with this opinion.

A true Copy

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

IN THE SUPREME COURT OF THE
STATE OF KANSAS
No. 80,418

JAMES A.M. SMITH, D.O.,
Appellant
V

S. JIM FARHA, MD.D.,
Appellee,

SYLLABUS BY THE COURT

1 The definition of peer review contained in K.S.A, 1998 Supp. 65-4915(a)(3) is stated and applied in relation to the privilege granted to members of a peer review committee under K.S.A. 65-442.

2 The protection afforded under the provisions of K.S.A. 5-442 exists only in the absence of lack of good faith or malice.

3 Proof of malice in defamation actions when a qualified privilege is found to exist requires a plaintiff to prove that the publication was made with knowledge that the defamatory

statement was false or with reckless disregard of whether it was false.

4 A court should be cautious in granting a motion for summary judgment when resolution of the depositive issue necessitates a determination of the state of mind of one or both of the parties. The existence of malice is ordinarily a question of FACT FOR THE JURY, but where the facts are not in dispute is is a question of law for the court. Summary judgment should be employed with caution in a defamation case.....

Page 5: In reversing summary judgment we also follow earlier sound advise expressed in Ruebke v Globe Communications Corp, 241 Kan. 595, 605, 738 P.2d 1246 (1987).: Bowen v Westerhaus, 224 Kan. 42,578 P.2d 1102 (1978)

> "we agree with authority relied upon by Dr. Smith in Ross v Wal-Mart Stores, Inc.730 F. Supp. 357,361 (D. Kan. 1990) that the proof of malice in defamation actions

when a qualified privilege is found to exist requires a plaintiff to prove that the publication was made with knowledge that the defamatory statement was false or with reckless disregard of whether it was false... In general the question of actual malice in a defamation action is a question of fact for the jury...There remains a genuine issue of material fact on this crucial point. We, therefore, reverse the summary judgment entered and remand for further proceedings."

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

John Murray,
Appellant

V

Holnam, Inc. and
Thomas Thornton
Defendants

Of whom Holnam Inc. is
Respondent

Appeal From Dorchester County
James Carlyle Williams, Jr.
Circuit Court Judge

Opinion No. 3283
Heard December 13, 2000-filed
January 8, 2001

REVERSED and REMANDED

STANDARD OF REVIEW

"Summary judgment is appropriate when it is clear there is NO genuine issue of material fact and the moving party is entitled to judgment as a matter of

law....judgment shall be granted if pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show there is NO genuine issue as to any material fact and moving party is entitled to judgment as matter of law...In determining whether any triable issue of fact exists, as will preclude summary judgment, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in light most favorable to the nonmoving party...Vermeer Carolinas's Inc., v Wood/Chuck Chipper Corp. 336 S. C. 53, 518 S. E.2d 301 (Ct App. 1999) if triable issues exist, those issues must go to the jury.. Rothrock v. Copeland,305 S. C. 402, 409 S.E.2d 366 (1991), Young, supra.

In Fleming v Rose, 338 S.C. 524, 526 S. E 2d 732 (Ct. App 2000), this Court explained:

The tort of defamation allows a plaintiff to recover for injury to his or her reputation as the result of the defendant's communications to others of a false message about the

plaintiff...The focus of defamation is not on the hurt to the defamed party's feelings but on the injury to his reputation.

QUALIFIED PRIVILEGE

In determining whether or not the communication was qualifiedly privileged, regard must be had to the occasion and to the relationship of the parties. When one has an interest in the subject matter of a communication, and the person (or persons) to whom it is made has a corresponding interest, ...The statement however, must be such as the occasion warrants, and must be made in good faith to protect the interests of the one who makes it and the persons to shom it is addressed...In general, the question whether an occasion gives rise to a qualified or conditional privilege is one of law for the court. However, the question whether THE PRIVILEGE HAS BEEN ABUSED IS ONE FOR THE JURY...this Court held that it was a question for the jury to determine if the publication went beyond

what the occasion required and was unnecessarily defamatory...

COMMON LAW MALICE

That the appellant believed the charges to be true did not justify it in publishing them in an improper and unjustified manner or with improper and unjustified motives. Proof that they were published in such manner and with such motives would constituate sufficient proof of malice, or malice in fact. It is not necessary that evidence must be offered of malignity or ill will, nor that those facts should be found....

CONCLUSION

We hold Holnam can be liable for Smoaks's allegedly, defamatory statement even though Smoak did not have express authority to make the statements. We rule a principal may be held liable for defamatory statemens made by an agent acting within the scope of his employment or with the SCOPE OF HIS APPARENT AUTHORITY. Further,

although the trial judge properly concluded Smoak was protected by a qualified privilege GENUINE ISSUES OF MATERIAL FACT EXIST REGARDING WHETHER Smoak exceeded the scope of his qualified privilege. Additionally, the issue of common law actual malice is a QUESTION FOR THE JURY. Finally, Murray is not barred from recovery by self-publication. Accordingly we REVERSE the trial judges order granting summary judgment and REMAND for trial"

REVERSED AND REMANDED.

HEARN, C. J. and STILWELL, J concur.

IN THE COURT OF APPEALS
OF THE STATE OF OREGON

ERNIE AFFOLTER
Appellant
V
BAUGH CONSTRUCTION OREGON, INC.
Respondent

9904-03898;A110867

Before Edmonds, Prsiding Judge; and Armstrong and Kistler, Judges

ARMSTRONG, J.

Reversed and remanded

ARMSTRONG, J

Plaintiff appeals from a judgment dismissing his defamation claim after the trial court granted defendant Baugh Construction Oregon, Inc.s motion for summary judgment. Because we conclude that there are questions of fact with regard to one of the alleged defamatory statements, we reverse the trial court's ruling.

"...we conclude that as a matter of law the statement was capable of a per se defamatory meaning. Statements that attach a person in the person's professional or employment capacity are defamatory per se, ie., without allegation or proof of special damages, when the attack relates to specific characteristics that pertain to the plaintiff's field of employment...Forrester's motivation to act on behalf of his employer is not the only factual prerequisite for the qualified privilege. A qualified privilege may be lost if the speaker does not believe that the statement is true or lacks reasonable grounds for believing the truth of the statement...If there is evidence that would support a finding that Forrester did not believe or had a REASONABLE DOUBT as to the truth of his statements, that evidence would give rise in a question of fact as to whether defendant abused its qualified privilege.

Because there are questions of fact as to whether Forrester believed the truth of his statement, and because the statement, if made, would be defamatory per se, we conclude that the trial court ERRED in granting defendant's motion for summary judgment.

REVERSED AND REMANDED"

34a



